BANK ONE CORPORATION
Mail Code - IL1-0264
1 Bank One Plaza
Chicago, IL 60670-0376

BANK ONE

May 5, 2003

Commission's Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: FURTHER NOTICE OF PROPOSED RULEMAKING
In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 03-62

Dear Secretary:

Bank One Corporation ("Bank One") appreciates the opportunity to comment on the Federal Communications Commission's ("FCC") Further Notice of Proposed Rulemaking ("Further Notice"), published by the FCC in the April 3, 2003, *Federal Register* (68 FR 16250), seeking comment on how the FCC can best fulfill its requirements under the Do-Not-Call Implementation Act ("Do-Not-Call Act"), which was signed into law on March 11, 2003.

Bank One is the nation's sixth-largest bank holding company, with assets of more than $275 billion. Bank One conducts its banking business through Bank One, N.A., Bank One, Delaware, N.A., and other affiliated national banks and operating subsidiaries. Bank One currently serves 53 million credit card customers and over 7 million retail households. Bank One also operates numerous non-bank subsidiaries that engage in credit card and merchant processing, consumer finance, mortgage banking, insurance, trust and investment management, brokerage, investment and merchant banking, venture capital, equipment leasing and data processing.

Bank One supports the essential goals of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"), which are to balance individual privacy rights and commercial freedoms of speech and trade in a way that protects the privacy of individuals and permits legitimate telemarketing practices. However, Bank One is concerned that unless the FCC makes clear that the TCPA preempts state do–not-call statutes, the FCC will be unable to harmonize the requirements of the Do-Not-Call Act with its statutory mandate under the TCPA to establish and operate a single national database.

The Do-Not-Call Act provides that the Federal Trade Commission ("FTC") may promulgate regulations establishing fees sufficient to implement and enforce the provisions relating to the "do-not-call" registry ("National Registry") of the Telemarketing Sales Rule ("TSR") (16 C.F.R. 310.4(b)(1)(iii)), promulgated under the Telephone Consumer Fraud and Abuse Prevention Act (15 U.S.C. § 6101 et seq.). The Do Not Call Act further requires that the FCC shall consult and coordinate with the FTC to maximize consistency with the rule promulgated by the FTC.

Congress has conferred upon the FCC exclusive jurisdiction over interstate telemarketing. The FCC is the regulatory agency to manage and enforce the National Registry. Further, the FCC National Registry should be the only registry with which telemarketers need to comply for interstate telemarketing. Any state laws that attempt to regulate telemarketing through other state "do-not-call" registries clearly impede the fulfillment of a congressionally mandated federal goal and should not be enforceable against telemarketers once the National Registry becomes effective.

The FCC should fulfill its critical congressional mandate to manage and enforce the National Registry by issuing an authoritative pronouncement that halts state authorities from improperly asserting their authority as it relates to telemarketing, a power the FCC clearly possesses.

A. The burdens of state telemarketing laws on interstate commerce

The burdens of state telemarketing laws on interstate commerce are evident and acknowledged by industry and federal regulators as well. In both the *FTC's Final Amended Rule and accompanying Statement of Basis and Purpose to the Telemarketing Sales Rule,* ("Final Rule and Statement") and the FCC's *Notice of Proposed Rule Making and Memorandum Opinion and Order regarding the Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 ("* Notice of Proposed Rule Making"), these burdens are highlighted.

In the Notice of Proposed Rule Making, the FCC states the following:

> "Such state lists vary widely in the methods used for collecting data, the fees charged, and the types of entities required to comply with their restrictions…. In some states, residents can register for the "do-not-call" lists at no charge. In

> others, telephone subscribers must pay a fee. The state "do-not-call" statutes provide for varying exceptions to the do-not-call requirements."[1]

In the Final Rule and Statement, the FTC cites a study conducted by Dr. James Miller demonstrating the significant additional cost associated with state registry compliance. The FTC states the following:

> "For example, Dr. James Miller, testifying on behalf of CCC, estimated that if the Commission's "do-not-call" proposal were enacted as proposed, it would cost all firms that sell their products via outbound telemarketing combined a total of $6.6 million to purchase access to the FTC's "do-not-call" registry and to check their calling lists against the "do-not-call" list to ensure that they do not call consumers who have asked not to be called. If companies could comply with both FTC and state regulations by purchasing access to the FTC's list and not calling consumers whose numbers appeared on that list, this would represent the total burden on firms to avoid calling consumers who did not wish to be called. However, Dr. Miller testified that the total cost to comply with the state regulations as well as the FTC requirement, should firms still have to purchase separate lists from each state having its own do-not-call provisions, could approximate $100 million."[2]

Businesses that conduct interstate telemarketing are heavily burdened by the costs of compliance with individual state registry laws. The Miller study cited above, though comprehensive, does not fully reflect the time, energy, operational dilemmas and legal expenses associated with state registry compliance. The inconsistencies from one state's laws to another's have heavily impacted the interstate outbound calling industry to a degree where certain businesses forego calling to particular states on account of more stringent laws, greater expenses, and greater fear of enforcement actions. These burdensome state inconsistencies include differences in: (i) applicable exemptions for calling a customer, (ii) registration fees, (iii) penalties for violation, and (iv) applicable dates for new state lists and quarterly updates. Additionally, the lack of intrastate restriction in the definition of "telemarketer," or "solicitor" in state registry laws constitutes a general burden on interstate commerce.

(i) *Applicable exemptions for calling a customer*

State registry laws provide inconsistent exemptions for business relationships, and different lengths of time for the tolling of a business relationship, making it difficult for a business to ascertain whether or not it can offer improved products to its own customers. For example, the Indiana "do-not-call" law does not contain a business relationship

---

[1] *In the matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking and Memorandum Opinion and Order, Adopted: September 12, 2002, Released: September 18, 2002, CG Docket No. 02-278, CC Docket No. 92-90, at 35.*

[2] Final Amended Rule and accompanying Statement of Basis and Purpose, Telemarketing Sales Rule, Federal Trade Commission, 16 CFR § 310, at 143 (Footnotes omitted).

exception.[3] Mississippi law states that "the act of purchasing consumer goods or services under an extension of credit does not create an existing business relationship between the consumer and the entity extending credit to the consumer for such purchase."[4] Wisconsin law states that the exception for calling a "current client" does not apply "if the recipient is a current client of an affiliate of such a person but is not a current client of such a person."[5] Colorado, Kansas, Oklahoma, and Pennsylvania, among other states, limit the time period during which a business may claim a customer exemption. In Alabama, California, Colorado, Connecticut, Illinois, Kansas, New York, Oklahoma, Texas and Wyoming, the business relationship can terminate at the request of the customer, eliminating the customer exemption altogether. The list above is not exhaustive but clearly demonstrates the legal and operational burdens that a company conducting interstate telephone sales encounters in merely ascertaining which of its customers it is permitted to call. This burden is unfortunately coupled with the fact that states such as Alabama, Connecticut, Kentucky, Louisiana, Michigan, Mississippi, New Mexico, Rhode Island, South Dakota, Texas, and Wyoming all have different permissible calling hours than those established by the TCPA.

(ii) *Registration fees and penalties for violation*

Interstate businesses can only register for the state list without charge in a limited number of states, such as Connecticut, Indiana, Missouri and Tennessee.[6] It is highly likely that a registration fee is a determining factor when an interstate business is deciding the states in which it will conduct telephone sales. There is little room for argument against the fact that such an entrance fee (or the amount of an entrance fee) can clearly determine which doors a business can afford to open, and to which states the flow of interstate commerce will continue. Similarly, a business newly subject to state restrictions is required to consider which states' enforcement fines could be cost prohibitive in the event of involuntary non-compliance. Fines in Kentucky and Indiana for example can be as high as $10,000 per violation.[7] In Kentucky secondary violations can range as high as $25,000.

(iii) *Applicable dates for new state lists and quarterly updates*

Due to state registry law expansion, businesses have been required to devote entire operations teams to monitoring the effective dates of new state lists and the dates when quarterly renewals are available. In those instances when compliance with particular dates is not operationally possible, outbound calling to those states is halted until the next calling cycle. Such direct interruptions in the flow of interstate commerce are the inevitable results of an ever-increasing volume of state registries. The cost of supporting

---

[3] IND. CODE ANN. § 24-4-7 (West 2003)
[4] MISS. CODE ANN. §3-77 (2003)
[5] WIS. STAT ANN. § 100.52 (West 2003)
[6] CONN. GEN. STAT. ANN. § 42-288a (West 2003), IND. CODE ANN. § 24-4-7 (West 2003), MO. ANN. STAT. § 407.1098 (West 2003), TENN. CODE ANN. § 65-4-401(2003) ,TENN. COMP. R. & REGS. § 1220-4-11 (2003)
[7] KY. REV. STAT. ANN. § 367.46955(15) (Banks-Baldwin 2003), IND. CODE ANN. § 24-4-7 (West 2003)

teams to monitor compliance with the myriad of state regulations has a direct impact on the eventual cost of interstate goods or services offered to consumers. The decrease in consumer cost benefit is directly proportional to the complexity created by a constant influx of new, inconsistent, state "do-not-call" laws. This equation should simply not exist in a free-flowing interstate commerce environment.

(iv) *Lack of intrastate restriction*

The definitions of "telemarketer" and "solicitor" in state registry laws do not specify that a telemarketer need be an intrastate telemarketer. As a result, an improper blanket approach to enforcement has been taken thus far by state authorities. This approach often improperly includes businesses conducting interstate telemarketing in state enforcement actions. This generally and collectively has the effect of state laws being more restrictive and more burdensome to interstate commerce than federal restrictions. That is, state registry laws are purported to include both intrastate and interstate telemarketing where federal jurisdiction exempts intrastate telemarketing from its realm.

B. The FCC has the authority to preempt state laws imposing restrictions on out-of-state telemarketers

The FCC's authority to preempt state laws imposing restrictions on out-of-state telemarketers derives from at least two places: 1) the language of the TCPA; and 2) Congress' general power to regulate interstate commerce and its delegation of that authority to the FCC in the Communications Act of 1934 (the "Communications Act").

1) The TCPA provides for preemption

Federal law can preempt state law without an express statement by Congress when the federal statute implies an intention to preempt state law. See New York Conference of Blue Cross v. Travelers Ins., 514 U.S. 644, 115 S. Ct. 1671, 1676 (1995). In the TCPA, Congress provided that "nothing in this section or in the regulations prescribed under this section shall preempt any state law that imposes more restrictive intrastate requirements or regulations."[8]

Congress' limitation on the exemption from preemption to state laws affecting intrastate telemarketing calls is direct evidence of Congress' intent that the TCPA preempt all state laws that affect interstate telemarketing calls. Consistent with the language of the TCPA and Congress' intent in enacting it, the FCC should clarify that the TCPA and any FCC rules adopted under it take precedence over state do-not-call statutes with respect to interstate calls, whether or not there is any conflict between the TCPA and the FCC's implementing rules and any state law regarding the subject.

---

[8] 47 U.S.C. § 227(e)(i)(emphasis supplied).

2) *Commerce Clause*

The Commerce Clause of the United States Constitution grants Congress the positive power to regulate commerce among the several states. In the Communications Act, Congress provided the FCC with jurisdiction over communications by wire. See 47 U.S.C. § 151. See also, MCI Communications Corp. v. American Tel. & Tel. Co., 462 F. Supp. 1072 (N.D. Ill. 1978) (FCC's jurisdiction is exclusive of state regulatory commissions). Although the Communications Act does not contain a preemption provision, it is not required that Congress expressly write a state preemption clause into a particular statute for there to be preemption. The Supreme Court has held that the Commerce Clause operates on a negative basis to prevent state laws that unduly burden interstate commerce and thereby impede free private trade in the national marketplace. Reeves, Inc. v. Stake, 447 U.S. 429, 437, 100 S. Ct. 2271, 2277 (1980).

As described above, state laws affecting interstate telemarketing communications impose significant burdens on telemarketers that are costly and inefficient. If the goal of the Communications Act is to be realized, the FCC must be free to strike down the costly and inefficient burdens on interstate commerce that are sometimes imposed by state regulation. National Association of Regulatory Utility Commissioners v. F.C.C., 746 F.2d 1492 (D.C. Cir.1984). The FCC should use its powers to clarify that any rules adopted by the FCC affecting telemarketing communications preempt state do-not-call statutes.

Bank One appreciates the opportunity to comment on the FCC Further Notice. If you have any questions concerning these comments, please do not hesitate to contact me at (302) 282-3012.

Sincerely,

Lynn A.Goldstein